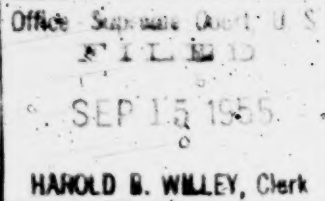


SUPREME COURT OF THE UNITED STATES

Nos. 332 and 333



In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 332,

WASHINGTON PUBLIC SERVICE COMMISSION, ET. AL.,
Appellants,

v.
THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET. AL.,
Appellants,

v.
THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLEES INTERVENING PLAINTIFFS, IN
OPPOSITION TO MOTION TO REVERSE
IN NOS. 332 AND 333.

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CASES CITED

The Denver and Rio Grande Western Railroad Company vs. The Union
Pacific Railroad Company, et al., 287 ICC 611.
Thompson vs. The United States, 343 U. S. 549.

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The Public Service Commission of Utah, The Public Utilities Commission of the State of Colorado, The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, Light Grain & Milling Co., The New Era Milling Company, The Wall

Rogalsky Milling Co., Walnut Creek Milling Co., Independent Lumber Company, Inc., Idaho Farm Bureau, Utah Growers Cooperative, Inc., Knudsen Builders Supply Company, Inc., Structural Steel and Forging Company, Inc., The Pueblo Chamber of Commerce, The Arkansas Valley Stock Feeders Association, Colorado State Wool Growers Association, Western Forest Industries Association, Koppers Company, Inc., J. I. Case Company, National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers' Association, Utah Cattle and Horse Growers' Association, intervening plaintiffs respectfully request this Honorable Court to deny the motion to reverse filed in Cases Nos. 332 and 333 by counsel for the defendants.

STATEMENT

This case arises by reason of a complaint filed by the Rio Grande Railroad against the Union Pacific Railroad with the Interstate Commerce Commission in August of 1949. Pursuant to said complaint the matter came on for hearing in December of 1949 at Salt Lake City, Utah and subsequent hearings were had in Boise, Idaho and Cheyenne, Wyoming, in 1950.

The matter was heard initially by Frank E. Mullen, Chief Examiner of the Interstate Commerce Commission, and as a result of the hearings had, Examiner Mullen submitted a proposed report granting to the complainant, the Rio Grande all of the relief sought by the Rio Grande for the benefit of the shippers who are dependent upon the Rio Grande for rail transportation service.

Paragraph 2 of Sheet 31 of the Proposed Report reads as follows:

"The record clearly shows that shippers and receivers of freight in localities and districts in Colorado and in Utah depending for railroad service solely upon the Rio Grande are unduly handicapped by the lack of such transportation arrangements and facilities, at joint through rates, which have become of great importance in modern merchandising. Establishment of joint through rates from and to points in the Northwest on the Union Pacific and its connections via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, are necessary and desirable in the public interest to permit communities located only upon the Rio Grande to be adequately served by that Railroad as part of the national transportation system."

This Proposed Report was challenged by the Union Pacific and Intervenors in support of it before the full Interstate Commerce Commission. The matter was argued on two separate occasions by all of the parties and as a result of the briefs and arguments had the Interstate Commerce Commission did render a decision on January 12, 1953, and by its decision granted a portion of the relief sought in the original complaint. (287 ICC 611). This decision then became the subject of two appeals to statutory courts, one in Nebraska and one in Colorado. The order of the Nebraska Court is now on appeal to this Court in Nos. 117-119.

The District Court for the District of Nebraska accepted the Commission's apparent findings that through routes were not in existence but modified the Commission's Order to limit the new through routes and joint rates to certain types of in-transit traffic.

The District Court for the State of Colorado ordered that "insofar as the Interstate Commerce Commission denied relief to the Rio Grande the order will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with the Court's opinion."

ARGUMENT

Since the rules of this Court do not provide for a motion to reverse and since the importance of this case to a large number of shippers and a vast geographical area of the United States is involved, we cannot believe that the Court will seriously entertain the motion to reverse.

However, in the interests of pointing out to the Court the magnitude of this case, we submit that the situation prevailing in Colorado and Utah is unique indeed.

The Union Pacific Railroad operates from Omaha to Ogden and Denver with inter-connections at Cheyenne, thence to points in California and the Pacific Northwest traversing Wyoming and Utah. The Rio Grande, on the other hand, operates from Denver via the Moffat Tunnel and Pueblo via Tennessee Pass to Dotsero, Grand Junction and on to Ogden, Utah. The fact is that the two railroads parallel each other from Denver and Pueblo to Ogden, Utah, across the Continental Divide. The Rio Grande has always been desirous of, and willing to grant to its shippers joint through rates and through routings with transit privileges, the same as any other modern railroad does for its shippers. However, this railroad which serves a large segment of the State of Colorado and Utah, is precluded and prevented from giving to its patrons the type and kind of service at the same rates as the shippers in Wyoming and

that portion of Utah served by the Union Pacific, enjoy from the Union Pacific. This deprivation of privileges and rates which is economically injurious to the flow of commerce in Colorado and Utah is brought about solely by reason of the fact that the Union Pacific refuses to join with the Rio Grande in publishing and maintaining joint through rates on traffic moving via the Rio Grande and via Ogden. It is true that certain exceptions have been made on certain categories of livestock, but these are infinitesimal compared with all of the needs of these communities.

Counsel for the defendants motion to reverse indicates a cavalier attitude towards this whole proceeding as being merely a raid upon the pocketbook of the Union Pacific.

As counsel for many shippers and persons concerned with the public interest aspect of this case, as distinguished from the railroads, we cannot refrain from pointing out that of the sixteen persons who have "decided" this case in its various phases not one has said that the Rio Grande's complaint had no basis in fact. On the other hand, the Examiner, who was the trier of the facts and heard all the witnesses, granted relief on all of the commodities sought. The Interstate Commerce Commissioners were split 5 to 5 on the through routes issue, which left that question undecided, but decided 6 to 4 that certain commodities should be permitted to move via those through routes at joint rates. Of the six district court judges who have handled this case, two judges, making the majority of the Nebraska court, did not take away from the Rio Grande that which the Commission gave them but rather limited the service which had been ordered by the Commission. The three Judges of the Colorado Court unanimously determined that through routes were in existence and ordered the Commission to

take steps to consider the classes of commodities which had not heretofore been the subject of Commission order.

This would indicate to us at least that this case is of such importance and magnitude that it should be decided on its merits by this Honorable Court. It should not be disposed of by a motion to reverse without giving the parties litigant an opportunity to present all of the record, briefs, and arguments to this court in order that a final determination of the rights and duties of the parties may be satisfactorily adjudicated.

ISSUES IN CONFLICT

The basic issues in this case are whether there are in existence today through routes via the Rio Grande Railroad through the Ogden Gateway and whether the failure on the part of the Union Pacific to establish joint rates with the Rio Grande via Ogden unjustly discriminates against the shipping public and the Rio Grande Railroad and whether the *Thompson* case (343 U.S. 549) applies to the determination of these issues.

The answer to these questions can only be obtained by full adjudication by this court of finality because the District Court of Nebraska has in effect tacidly accepted the Commission in its findings in this matter and the District Court in Colorado has expressly reversed the Commission's apparent findings on these issues. We, therefore, have two intermediate court decisions which are in seeming conflict. If this court were to grant the motion to reverse the issues and questions of law would stand in a confused and muddled state neither granting relief nor vindication to either side. The interests of justice dictate that this Court entertain the appeals on their merits and render its judgment for the

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guidance of, the courts and the Commission to say nothing of the interests of the shipping public and the Railroads involved. We, therefore, respectfully request this Honorable Court to deny the defendants' motion to reverse in Cases numbered 332 and 333.

Respectfully submitted,

JOHN R. BARRY,

*Counsel of record for
Intervening Plaintiffs in
Nos. 332 and 333.*

PROOF OF SERVICE

I, John R. Barry, one of counsel of record for Interveners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1955, I served, on behalf of the Interveners herein, copies of the foregoing Brief of Intervening Plaintiffs in opposition to Motion to Reverse in Nos. 332 and 333 on the several parties thereto and parties to the appeals in Nos. 332, 333, and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Frank E. Holman, Esq.
1006 Hoge Building
Seattle 4, Washington

and with first-class postage prepaid to:

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Henry Zarlengo, Esq.
Assistant Attorney General
State of Colorado
Denver, Colorado

5. Peter M. Lowe,
Assistant Att. General of Utah
State Capitol, Salt Lake City, Utah

6. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel

The American Short Line Railroad Association
 2000 Massachusetts Avenue, N. W.
 Washington 6, D. C.

9. On the National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association and Utah Cattle and Horse Growers Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lee J. Quasi, Esq.
 139 North Clark Street
 Chicago 2, Illinois

10. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company, and Wabash Railroad Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their respective attorneys of record as follows:

F. O. Steadry, Esq.
 Chicago and North Western Railway Company
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 Chicago 6, Illinois

Warren H. Plöeger, Esq.
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 St. Paul 1, Minnesota.

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Roland J. Lehman, Esq.
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Elmer S. Davis, Esq.
Wabash Railroad Company
Railway Exchange Building
St. Louis 1, Missouri

Elmer B. Collins, Esq.
Union Pacific Railroad Company
1416 Dodge Street
Omaha 2, Nebraska

11. On Brotherhood Committees of employees of Union Pacific Railroad Company by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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Symes Building
Denver 2, Colorado

JOHN R. BARRY,
*One of counsel of Record
for Intervenors Herein.*